

UNITED STATES TAX COURT

WASHINGTON, DC 20217

ARLETA S. STOVER REFLECTIONS)	
COUNSELING,)	
Petitioner)	
)	
v.)	Docket No. 15276-13L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case is before the Court on a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330,¹ dated May 29, 2013, for petitioner's employment tax liabilities for taxable periods ending September 30 and December 31, 2009; March 31, June 30, September 30, and December 31, 2010; March 31, 2011; and March 31, 2012 (notice of determination). On July 15, 2014, respondent filed a motion for summary judgment under Rule 121. On August 8, 2014, petitioner filed a response to respondent's motion for summary judgment.

Background

Petitioner, Arleta S. Stover, wholly owns Reflections Counseling, a sole proprietorship treated as a disregarded entity. Reflections Counseling timely filed Forms 941, Employer's Quarterly Federal Tax Return, for the above-stated periods,

¹Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

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but failed to pay all of the liabilities reported on the returns.² Respondent assessed the tax shown on the returns, together with penalties and interest.

On September 27, 2012, respondent sent a Letter 1058, Final Notice - Notice of Intent to Levy and Notice of Your Right to a Hearing (levy notice), advising petitioner that respondent intended to collect by levy the employment tax liabilities. The letter also informed petitioner of her right to receive a collection due process (CDP) hearing with respondent's Office of Appeals (Appeals).

On October 19, 2012, petitioner's representative sent a letter to Revenue Officer (RO) Irma Cantu, in which he asserted that petitioner qualified for currently not collectible (CNC) status. Along with the letter, petitioner's representative enclosed three additional documents: (1) a Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, which petitioner completed on October 17, 2012; (2) a copy of petitioner's 2011 income tax return; and (3) petitioner's personal bank account statements with Southwest Federal Credit Union from January to September 2012.³

The Form 433-A claimed that petitioner earned monthly net business income in the amount of \$1,381, based on gross receipts and cash of \$6,020 and business expenses of \$4,639. Petitioner's monthly living expenses totaled \$2,308, resulting in a monthly deficit of \$927. On Schedule C, Profit or Loss from Business, attached to the 2011 tax return, petitioner reported annual gross receipts in the amount of \$120,747, which would average to \$10,062.25 per month, an amount well in excess of that claimed on the Form 433-A. On account of this discrepancy and certain other inconsistencies between petitioner's Form 433-A and the other documentation submitted, RO Cantu requested additional information from

²Prior to the date of the notice of determination, through a series of abatements and transfers of overpayment the taxable period ending September 30, 2009, balance is zero. Similarly, after the date of the notice of determination, through a series of payments the taxable period ending March 31, 2012, balance is now zero.

³The record is unclear whether Reflections Counseling had its own bank account.

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petitioner, including a list of Reflections's accounts receivable and profit and loss statement by November 13, 2012.

On October 29, 2012, petitioner filed Form 12153, Request for a Collection Due Process or Equivalent Hearing. Petitioner stated in Form 12153 she could not pay the balance of liabilities and that she challenged the appropriateness of the proposed collection action. Petitioner also disputed the underlying liabilities within Form 12153.

Petitioner's case was assigned to Settlement Officer (SO) Scott Penny. In a letter dated January 24, 2013, SO Penny scheduled a CDP hearing by telephone for February 21, 2013. In that letter, SO Penny also requested that, within 14 days of the Scheduled hearing, petitioner provide: (1) a profit and loss statement for 2012 with verification; (2) signed Forms 941 and 940 for the period ending December 31, 2012; (3) proof of Federal tax deposits for the fourth quarter of 2012 and first quarter of 2013; and (4) petitioner's proposal to resolve the outstanding liability, supplemented with documentation supporting petitioner's position.

On February 1, 2013, petitioner's representative sent a letter to SO Penny, in which she enclosed the documents previously provided to RO Cantu and reiterated her request that petitioner's account be placed in CNC status. Petitioner's representative alleged that RO Cantu had agreed that petitioner was currently not collectible, but had claimed IRS rules prohibit placing an ongoing business in CNC status. Petitioner's representative also informed SO Penny that petitioner did not have profit and loss statements for 2012 and could not afford to hire a CPA to prepare one, but that business bank statements had been provided to RO Cantu and were enclosed with the letter.

On February 20, 2013, petitioner's representative sent respondent copies of signed Forms 941 and 940 for the period ending December 31, 2012, proof of Federal tax deposits for the fourth quarter of 2012 and first quarter of 2013, and petitioner's credit union statements from October 2012 to January 2013. Petitioner's representative also enclosed a letter in which she once again reiterated her claim that petitioner qualified for CNC status, both as an individual and in her business capacity. The Form 433-A dated October 17, 2012, showed that, while the business could stay current on taxes and pay its expenses, net income from the business was insufficient to pay petitioner's living expenses.

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On February 21, 2013, SO Penny held the CDP hearing with petitioner's representative, during which SO Penny requested additional information to support the Form 433-A.

On March 18, 2013, petitioner's representative sent a letter to SO Penny with a revised section 7 (Sole Proprietorship Information) to Form 433-A, in which she decreased her claimed wages from \$2,500 to \$1,441, increased her claimed utilities/telephone expenses from \$305 to \$643, and reflecting net business income of \$2,102. The letter also included a revised section 5 (Monthly Income and Expenses), which decreased living expenses in excess of income from \$927 to \$83. Petitioner supported these amounts with copies of bank statements and her bills reflecting the expenses incurred and paid. Four days later, petitioner's representative sent SO Penny a revised Form 433-A dated March 22, 2013. Sections 5 and 7 of which showed the same amounts as set forth on sections 5 and 7 enclosed with the March 18, 2013, letter.

On March 25, 2013, SO Penny reviewed petitioner's case file. He found it was difficult to determine petitioner's actual income because she commingled personal and business expenses in one bank account, but concluded that petitioner had "minimal to no equity in assets."

On April 26, 2013, SO Penny called petitioner's representative. SO Penny stated that petitioner's ability to pay personal and business expenses, including three cell phones, contradicted her financial statements and return. The return showed adjusted gross income of \$2,403 for tax year 2011, which SO Penny thought was too small, suggesting that petitioner had some other means of support. SO Penny stated that on the basis of incomplete and contradictory information, he could not recommend CNC status for either petitioner or Reflections Counseling. Petitioner's representative requested a partial pay installment agreement (PPIA), but SO Penny said a PPIA was not an option. SO Penny offered petitioner's representative an installment agreement of \$350 month, which petitioner ultimately declined.

On May 2, 2013, petitioner's representative sent another letter to SO Penny, in which she agreed with the settlement officer's assessment that \$2,043 is insufficient to live on, but explained that, during 2010, petitioner received life insurance proceeds in the amount of \$20,000 following the death of her biological

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father, and during 2011, had borrowed substantially against the equity in her home and received a loan in the amount of \$14,000 from her adoptive father. The letter included copies of three cashier's checks, two in the amount of \$10,000 and the third in the amount of \$4,000, which represented the proceeds of home equity bank loans, and a bank statement reflecting a \$24,800 home equity line of credit.

Additionally, in the letter sent on May 2, 2013, petitioner's representative stated that respondent had previously determined that petitioner qualified for CNC status, but that in previous discussion, RO Cantu had claimed that respondent's rules prohibited placing an ongoing business on CNC status. Petitioner's representative again cited Internal Revenue Manual 5.16.1.2.7 (05-22-2012), which explains the standard for placing an ongoing business in CNC status.

On May 17, 2013, SO Penny called petitioner's representative and stated that the IRM provision she cited assumed no collection potential from assets. According to SO Penny, petitioner had accounts receivable that could be collected, and she was able to borrow money from the bank but had made no payments to respondent.

Additionally, SO Penny informed petitioner's representative that he found errors within the multiple Forms 433-A reflecting different amounts for income and expenses. Furthermore, petitioner commingled business and personal funds in her bank account. According to SO Penny, petitioner was also able to continue to borrow money and pay interest on the debt after the taxes accrued. On the basis of these inconsistencies, SO Penny denied CNC status for petitioner.

On May 29, 2013, the Appeals Team Manager issued the notice of determination sustaining respondent's proposed collection by levy of petitioner's employment tax liabilities for taxable periods ending September 30 and December 31, 2009; March 31, June 30, September 30, and December 31, 2010; March 31, 2011; and March 31, 2012.

The notice of determination included a breakdown of petitioner's financial information, as provided in the Forms 433-A and the 2011 Schedule C, and set out SO Penny's determination of such amounts. SO Penny rejected or reduced a number of petitioner's claimed monthly business expenses, including lowering her utilities and phone expenses from \$643 to \$305, and adjusted certain personal

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expenses, including rejecting petitioner's claimed "other expenses" of \$141. On the basis of those adjustments, SO Penny concluded that petitioner was left with \$133.00 after expenses each month.

In the notice of determination, SO Penny noted that: (1) petitioner's representative indicated that petitioner had no ability to pay the liabilities; (2) petitioner's 2011 income tax return reflected net income of \$2,403, which consisted of wages, taxable interest, and business income, and that when asked how she paid her necessary living expenses, she stated that she received life insurance proceeds of \$20,000, secured home equity loans of \$24,000, and borrowed \$14,000; (3) the employment tax liabilities were incurred during 2009, 2010, and 2011, that the liabilities "arose from late-filed returns filed in 2012, and that petitioner's life insurance, home equity loans, and a family loan could have satisfied petitioner's liabilities, while leaving her with an additional \$40,000 to live on; (4) one of petitioner's bank accounts was not currently used, and the other account was used for both personal and business expenses, thus making it very difficult to determine the necessary business and personal expenses; and (5) petitioner provided two different Forms 433-A during the hearing and that each time an expense was determined to be too high, she would increase another expense.

The notice of determination stated that suspending a collection action on an ongoing business is appropriate only when enforcement cannot be taken due to the business' lack of distrainable account receivables or equity in assets. Petitioner provided a list of assets that appeared to be unencumbered and internal resources reflected viable accounts receivable that could be used to satisfy the outstanding liabilities. Therefore SO Penny concluded, based upon the above determinations, that petitioner was not entitled to CNC status, and stated that respondent afforded petitioner the opportunity to resolve the employment tax liabilities with an installment agreement, but that petitioner declined entering into an installment agreement.

On July 3, 2013, petitioner timely filed a petition with this Court. In the petition, petitioner alleged that: (1) SO Penny erred by not allowing petitioner certain business expenses claimed on her Schedule C attached to her 2011 income tax return, e.g., claimed advertising expense and contract labor expense; (2) SO Penny used an inaccurate figure for wages, that petitioner actually paid \$34,371.26 more than the annualized figure for "gross wages" determined by SO Penny, and

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that the error reduced petitioner's net income by \$2,864.27 per month; (3) SO Penny erred by reducing petitioner's claimed "Utilities/Telephone" expense by more than 50% without explanation, and that she supported the claimed amount with three to five months' worth of utility bills and bank statements; (4) SO Penny erred by not allowing \$141 in "other expenses" relating to petitioner's student loan payments, and that she provided bank statements to respondent reflecting monthly debits of \$141.24, with the payee being, "SALLIE MAE - SLMA DEBIT"; (5) SO Penny incorrectly determined that petitioner still had all of the \$20,000 life insurance proceeds available in 2011 to fully satisfy the employment tax liabilities, and that petitioner advised him that she had only some of these funds remaining in 2011; and (6) SO Penny erred in determining that petitioner only increased expenses when submitting Forms 433-A, asserting that the Form 433-A submitted on March 22, 2013, decreased life insurance expense from \$213 to \$67, and reduced the total amount of business expenses.

Discussion

Summary judgment serves to "expedite litigation and avoid unnecessary and expensive trials." Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). The Court may grant summary judgment if there are no genuine issues of material fact. Naftel v. Commissioner, 85 T.C. 527, 529 (1985). The moving party bears the burden of proving that no genuine issues of material fact exist, and that he or she is entitled to judgment as a matter of law. See FPL Grp., Inc. & Subs. v. Commissioner, 115 T.C. 554 (2000); Bond v. Commissioner, 100 T.C. 32, 36 (1993); Naftel v. Commissioner, 85 T.C. at 529. In deciding whether to grant summary judgment, the facts and the inferences drawn from those facts, must be considered in the light most favorable to the nonmoving party. Naftel v. Commissioner, 85 T.C. at 529.

Section 6330 Hearing

Under section 6331, if a person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, the Secretary may collect such tax by levy upon all property and rights to property belonging to the taxpayer. A taxpayer may appeal the proposed levy to the Internal Revenue Service (IRS) under section 6330 by requesting a CDP hearing. At the hearing the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed levy, including

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challenges to the appropriateness of the collection action and collection alternatives such as an offer-in-compromise. Sec. 6330(c)(2)(A). The underlying tax liability is properly at issue at a collection due process hearing only when the taxpayer has not received a notice of deficiency or has not otherwise had an opportunity to challenge the liability. Sec. 6330(c)(2)(B).

Following a CDP hearing, the Appeals officer must determine whether the proposed levy may proceed. The Appeals officer is required to take into consideration: (1) verification that the requirements of applicable law and administrative procedure have been met; (2) relevant issues raised by the taxpayer; and (3) whether the proposed collection action "balances the need for the efficient collection of taxes with the legitimate concern of the * * * [taxpayer] that any collection action be no more intrusive than necessary." Sec. 6330(c)(3). After the CDP hearing concludes, the taxpayer may still appeal the hearing and seek judicial review in the Tax Court pursuant to section 6330(d).

Standard of Review

When the underlying tax liability is not properly at issue, the Court will review the Commissioner's administrative determination for abuse of discretion. Sego v. Commissioner, 114 T.C.604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). A taxpayer may not challenge the underlying tax liability on petition to the Tax Court if the issue was not raised in the taxpayer's CDP hearing. See Giamelli v. Commissioner, 129 T.C. 112, 112-116 (2007).

Here, petitioner did not contest the underlying tax liability during her CDP hearing. Therefore, the Court must determine whether the Appeals officer erred in sustaining the Commissioner's proposed levy. The Court will review for an abuse of discretion. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). In reviewing for abuse of discretion, the Court will reject the determination of the Appeal's Office only if the determination was arbitrary, capricious, or without sound basis in fact or law. See Murphy v. Commissioner, 125 T.C. 301, 308, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006).

Judicial review of a notice of determination is limited to issues the taxpayer properly raised at the CDP hearing. Sec. 301.6330-1(f)(2), Q&A-F3, Proced. & Admin. Regs.; see Giamelli v. Commissioner, 129 T.C. at 112-116 (2007). Under

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the Court's rules, a petition filed in a section 6330 case must contain "clear and concise assignments of each and every error which the petitioner alleges to have been committed in the notice of determination * * * Any issue not raised in the assignments of error shall be deemed conceded." Rule 331(b)(4).

Petitioner's Request for Partial Pay Installment Agreement

In petitioner's response to respondent's motion for summary judgment, she asserts she requested a PPIA, but both SO Penny and RO Cantu told petitioner that a PPIA was not an option. SO Penny subsequently recommended an installment agreement of \$350 a month; however, petitioner rejected this offer due to the inability to pay.

This Court has consistently held that an abuse of discretion cannot be established solely on the fact the Commissioner rejects a taxpayer's PPIA proposal. See generally, McClanahan v. Commissioner, T.C. Memo 2008-161. However, the IRM offers guidance in granting or denying a PPIA: "Before a PPIA may be granted, equity in assets must be addressed and * * * in most cases taxpayers will be required to use equity in assets to pay liabilities." IRM 5.14.2.2(2) (July 12, 2005).

The IRM merely reflects the Commissioner's internal procedures and does not have the force of law. Therefore, it does bind this Court. Vallone v. Commissioner, 88 T.C. 794, 807-08 (1987). When the Commissioner deviates from its own internal procedures, such action does not automatically render an abuse of discretion. Id. However, when the Commissioner bases its determination of a case wholly on misapplication of internal procedures, there may exist an abuse of discretion. See e.g., Fairlamb v. Commissioner, T.C. Memo. 2010-22.

Respondent initially denied petitioner's request for PPIA due to a lack of information. Petitioner subsequently gave SO Penny the information he requested, which reflected limited income and little equity. Afterwards, however, SO Penny never reevaluated petitioner's PPIA request.

Then respondent denied petitioner CNC status due to the available assets in accounts receivable. If respondent granted petitioner's PPIA request, petitioner's Collection Status Expiration Date (CSED) would not lapse until the year 2022.

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The regulations and IRM provide that respondent may condition a PPIA on the taxpayer agreeing to extend the CSED. Sec. 301.6159-1(c)(3), *Proced. & Admin. Regs.*; IRM 5.1.19.3.5 (Oct. 16, 2012). If respondent approved petitioner's PPIA request, the soonest possible expiration CSED still affords at least seven years of collection from petitioner.

Petitioner's Request for Currently Not Collectible Status

Pursuant to section 7122, the Commissioner may compromise a taxpayer's outstanding tax liabilities on three grounds: (1) doubt as to liability; (2) doubt as to collectibility; and (3) promotion of effective tax administration. Sec. 301.7122-1(b), *Proced. & Admin. Regs.*

Doubt as to collectibility exists when "the taxpayer's assets and income are less than the full amount of the liability." Sec. 301.7122-1(b)(2), *Proced. & Admin. Regs.* Determinations based on doubt as to collectibility will include a determination of a taxpayer's ability to pay, and the Secretary is required to "permit taxpayers to retain sufficient funds to pay basic living expenses." Sec. 301.7122-1(c)(2)(i), *Proced. & Admin. Regs.*

An offer-in-compromise based on doubt as to collectibility "will be considered acceptable if it is unlikely that the tax can be collected in full and the offer reasonably reflects the amount the Service could collect through other means * * * This amount is the reasonable collection potential of a case." Rev. Proc. 2003-71, sec. 4.02(2), 2003-2 C.B. at 517.

The policy of promoting effective tax administration means that the IRS has discretion to compromise liability when full collection could be achieved but would cause an economic hardship to the taxpayer and the compromise would not undermine compliance of the tax laws. See id.; see also sec. 301.6343-1(b)(4), *Proced. & Admin. Regs.*

The IRM provides procedures for analyzing a taxpayer's financial condition to determine reasonable collection potential. See IRM pt. 5.8.5.1 (Sept. 23, 2008). A taxpayer's reasonable collection potential is defined under the IRM as net equity plus future income. Id. pt. 5.8.4.3 (June 1, 2010). "Future income is defined as an estimate of the taxpayer's ability to pay based on an analysis of gross income, less

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necessary living expenses, for a specific number of months into the future. The number of months depends on the payment terms of the offer.” Id. pt. 5.8.5.23(2) (Oct. 22, 2010). “Generally, the amount to be collected from future income is calculated by taking the projected gross monthly income, less allowable expenses, and multiplying the difference by the number of months applicable to the terms of the offer.” Id. pt. 5.8.5.23(3) (Oct. 22, 2010).

CNC status is a temporary status given to taxpayers who generally do not have enough income or assets to pay the liability. This is an alternative to collection taxpayers may propose under section 6330(c)(2)(iii). Appeals is required to take this proposal “into consideration” pursuant to section 6330(c)(3)(B).

In the case of a sole proprietorship, the sole proprietor is personally liable for the entire amount of taxes due. If the Commissioner deems the taxes uncollectible, the account is required to be reported under a hardship closing code. See IRM pt. 5.16.1.2.7. The taxpayer provides all relevant information requested by Appeals to establish an economic hardship. See Pitts v. Commissioner, T.C. Memo. 2010-101.

For a taxpayer to justify suspending collection, she or he must show financial circumstances reflecting an economic hardship that render him or her unable to pay: “Form 433-A is the means by which the IRS obtains this financial information from the taxpayer.” Id. Economic hardship, however, is not a life merely void of luxury or opulence. Rather, it is: “[T]he inability to meet reasonable basic living expenses.” IRM pt. 33.3.2.3.2 (Nov. 4, 2010).

If the Form 433-A verifies that the individual owner of a business, i.e., a sole proprietor, is unable to pay and the Form 433-B verifies the sole proprietor is responsible for the account and liable for the business taxes, then the Commissioner may, within its discretion, report the business tax liabilities as CNC hardship. This is true even if petitioner has unfiled returns. Vinateiri v. Commissioner, 133 T.C. 392, 402 (2009) (holding the Commissioner abused its discretion by denying petitioner’s CNC status, regardless of taxpayer’s noncompliance with filing required returns); IRM pt. 21.3.12.4.12.2 (Oct. 1, 2014).

Here, petitioner provided the requisite Form 433-A, her personal bank statements, as well as a profit and loss statement, all of which collectively showed

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the amount of petitioner's net receipts and expenditures. SO Penny questioned certain expenditures, and petitioner substantiated them with documentation, such as her phone bills. SO Penny did not provide a basis or explanation for denying these deductions claimed.

SO Penny also questioned petitioner's commingling of personal and business assets. Despite the confusion created by petitioner's commingling of assets, SO Penny nevertheless concluded that there was minimal equity in both petitioner's personal belongings and in her business assets. Petitioner is the only owner of Reflections Counseling. If the sole proprietorship has no equity, then petitioner has little money. Her 2011 income tax return reflected net income of \$2,403. Even though SO Penny acknowledged petitioner had no equity in her home, he insisted that petitioner could borrow more money from her home equity to pay the tax liability. Despite receiving life insurance proceeds from her father's death and taking out secured home equity loans, the fact remains petitioner had no collectibility potential.

Respondent asserts the loans and insurance proceeds combined were enough to satisfy petitioner's outstanding liability, but these funds had been used up by the time of the hearing, and SO Penny acknowledged that petitioner had no further borrowing potential. The record does not provide an adequate explanation for SO Penny's conclusion that petitioner was not entitled to CNC status.

Conclusion

On the present record, the Court will deny respondent's motion for summary judgment: "If a court finds the administrative record inadequate for judicial review, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" See Olsen v. United States, 414 F.3d 144, 155 (1st Cir. 2005), quoting Fl. Power & Lught Co. v. Lorion, 470 U.S. 729, 744 (1985).

The Court will remand this case to respondent's Appeals Office to clarify why it rejected petitioner's PPIA, in addition to clarify the subsequent offer of \$350 a month, and to clarify its determination that petitioner does not qualify for CNC status.

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Considering the foregoing, it is

ORDERED that this case is remanded to the Appeals Office of the Internal Revenue Service for reconsideration of petitioner's reasonable collection potential. It is further

ORDERED that respondent shall offer petitioner an administrative hearing at respondent's Appeals Office located closest to petitioner's residence (or at such other place as may be mutually agreed upon) at a reasonable and mutually agreed upon date and time, but no later than February 20, 2015. It is further

ORDERED that on or before March 2, 2015, the parties shall file with the Court a joint status report.

(Signed) Elizabeth Crewson Paris
Judge

Dated: Washington, D.C.
November 21, 2014